L v S

HIGH COURT (SIBU) — ORIGINATING SUMMONS NO 24–13 OF 2000
CLEMENT SKINNER J
31 OCTOBER 2001

Family Law *— Children — Custodianship — Application for custodionship by mother — Child below seven years of age — Whether presumption under s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 had been rebutted — Welfare of child paramount*

This was an application by the plaintiff wife for the care, custody and control of a two-year old child who was with the defendant husband. The wife alleged that the husband had an affair with one KSP and as a result thereof, the wife returned to her mother's house. The wife was then pregnant. The husband had visited the wife together with his father to ask for a divorce and for permission to live with KSP. The wife refused and the husband then became hysterical and threatened to kill his own father. The husband was arrested and detained for one night by the police. The following day, the husband bought a ring for KSP but KSP returned the ring due to objections from her family members. As a result thereof, the husband became suicidal and was admitted to the local hospital. The husband was diagnosed as 'parasuicide'. Around that time, the husband deliberately set fire to the house rented by the husband and wife to run a music school. Thereafter, the wife gave birth to the child and in the child's birth certificate, the name of the child's father was omitted. The wife took care of the child after he was born. Sometime later, the couple was reconciled and the child lived together with them. The reconciliation was short-lived and the wife left the husband and their child after the husband had assaulted her. The wife tried to obtain the child back from the husband but was unsuccessful. The husband did not deny that those incidents took place. The husband however, stated that there were no divorce proceedings pending between the parties and he was anxious to be reconciled with the wife.

Held, allowing the plaintiff's application:

(1) The clear and plain words of s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') must be given effect to where the child concerned was less than seven years of age and the presumption should be considered as one of the factors in awarding custody. Section 88(3) of the Act was an evidential provision and once it came into play, it was for the judge to consider whether or not the presumption had been rebutted by what was revealed in the proceedings (see p 595D–E).

(2) The wife only worked two hours in the afternoons and she would have more time to devote herself to the care and needs of the child (see p 596F).

(3) The wife had tried to reconcile with the husband after the alleged adultery. As the wife had already given reconciliation a chance for the sake of the child, she cannot be faulted for not wanting to do so again. Further, there were reasons to doubt the sincerity of the husband's wish to be reconciled with the wife. The husband's requests for reconciliation seemed to be directed at enhancing the husband's case in this contest for the custody of the child. Therefore, the arguments advanced on the husband's behalf on the ground of reconciliation was perverse in the circumstances (see pp 598F, 599A–E).

(4) This was not a case where the child would be uprooted and thrust into an alien environment if the wife was given custody of the child. In fact, if the wife gained custody of the child, he would be returning to a familiar household. As for the husband's allegations that the child would be emotionally disturbed by a change of households, there was no medical evidence to suggest that this would be so (see p 599E–G).

(5) Accordingly, the presumption under s 88(3) of the Act which applied in favour of the wife had not been rebutted (see p 600A).

(6) Although it was not in the child's interest that the wife had obtained a birth certificate without stipulating the name of the husband as the child's father, such conduct would not by itself be sufficient to disqualify her from having custody, care and control of the child (see p 600C–D).

(7) Considering the husband's impulsive, violent and dangerous behaviour and his being diagnosed as a 'parasuicide', it would not be in the best interest and welfare of the child that he should, at this early and critical stage of his life, be brought up in an environment that would expose him to the risks posed by the husband's volatile temperament (see p 602C–F).

(8) Having considered all the factors and giving paramount consideration to the welfare of the child, the custody, care and control of the child should be awarded forthwith to the wife subject to reasonable access to the husband (see p 603C–D).

[Bahasa Malaysia summary

Ini adalah permohonan oleh isteri, sebagai plaintif, bagi penjagaan dan kawalan seorang kanak-kanak berumur dua tahun yang berada dengan suami, sebagai defendan. Isteri mendakwa suami telah mempunyai hubungan dengan KSP dan, oleh kerana ini, isteri kembali ke rumah ibunya. Si isteri pada masa itu hamil. Suami telah mengunjungi isteri bersama dengan ayahnya untuk meminta cerai dan izin dengan tinggal dengan KSP. Isteri enggan berbuat demikian dan suami menjadi histerikal dan ugut akan membunuh ayah sendirinya. Suami di tangkap dan di tahan selama satu malam. Pada keesokan harinya, suami membeli sebentuk cincin bagi KSP tetapi KSP

memulangkan cincin itu kerana bantahan dari ahli-ahli keluarganya. Oleh kerana ini, suami hendak membunuh diri dan telah dimasukkan ke dalam hospital tempatan. Suami didiagnos sebagai 'parasuicide'. Lebih kurang pada masa yang sama, suami denagn sengaja mencetuskan api pada rumah yang disewa suami dan isteri itu bagi maksud diuruskan sebagai sekolah musik. Selepas itu, isteri telah melahirkan anaknya dan dalam sijil beranak anaknya itu, nama ayah anak itu tidak diisikan. Isteri menjaga anak itu selepas dia dilahirkan. Setelah beberapa lama, pasangan ini kembali semula bersama dan anak itu hidup bersama mereka. Pengembalian ini bagi sejenak sahaja dan isteri meninggalkan suami serta anaknya selepas suami memukul isteri. Isteri cuba mendapatkan anak itu dari suami tetapi tidak berjaya. Suami tidak menafikan insiden-insiden yang telah berlaku itu. Walau bagaimanapun, suami mengatan bahawa tiada prosiding perceraian yang dimulakan di antara pasangan tersebut dan dia ingin kembali semula kepada isterinya.

Diputuskan, membenarkan permohonan plaintif:

(1) Perkataan yang jelas dan mudah s 88(3) Akta Pemulikan Undang-undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') harus diperkuatkuasakan di mana kanak-kanak berkenaan berumur kurang dari tujuh tahun dan andaian tersebut perlu dipertimbangkan sebagai salah satu factor dalam pemberian penjagaan. Seksyen 88(3) Akta tersebut adalah peruntukan keterangan dan, sebaik sahaja ia dikuatkuasakan, adalah terpulang kepada hakim untuk mempertimbangkan sama ada andaian tersebut telah ditolak oleh apa yang diterangkan dalam prosiding (lihat ms 595D–E).

(2) Isteri hanya bekerja dua jam pada waktu petang dan dia pasti mempunyai lebih masa untuk menjaga dan memastikan keperluan anak tersebut (lihat ms 596F).

(3) Isteri mencuba untuk berbaik dengan suaminya selepas perhubungan luar nikah yang didakwanya itu. Oleh kerana isteri telahpun memberikan peluang untuk berbaik di atas kebaikan anaknya itu, dia tidak boleh dipersalahkan untuk tidak mahu berbuat demikian lagi. Lagipun, ada sebab-sebab untuk mengesyaki kejujuran suami untuk beringin bersama isterinya. Permintaan suami untuk berbaik kembali nampaknya bertujuan untuk menguatkan kes suami dalam pertandingan mendapatkan penjagaan anak tersebut. Oleh itu, hujahan yang ditawarkan bagi pihak suami sebagai alasan berbaik kembali dalam keadaan sebegini adalah pemutabalikan (lihat ms 598F, 599A–E).

(4) Ini tidak merupakan kes di mana kanak-kanak itu akan dicabut dan tercampak ke dalam alam sekeliling yang asing sekiranya isteri diberikan penjagaan kanak-kanak itu. Kebetulannya, sekiranya isteri diberi penjagaan, kanak-kanak itu akan kembali ke rumahtangga yang dikenalinya. Berkaitan tuduhan suami bahawa

emosi kanak-kanak itu akan terganggu sekiranya rumahtangganya ditukar, tiada keterangan perubatan yang mengatakan ia semestinya sedemikian (lihat ms 599E–G).

(5) Sewajarnya, andaian di bawah s 88(3) Akta tersebut yang memihak kepada isteri tidak ditolak (lihat ms 600A).

(6) Walaupun bukan dalam kepentingan kanak-kanak tersebut isteri telah memperolehi sijil beranak tanpa menamakan suaminya sebagai ayah kepada kanak-kanak tersebut, perlakuan sebegini, secara sendirinya, tidak mencukupi untuk tidak melayakkan isteri untuk mendapatkan penjagaan dan kawalan kanak-kanak tersebut (lihat ms 600C–D).

(7) Memandangkan kelakuan suami yang impulsif, ganas dan bahaya dan memandangkan bahawa ia telah didiagnoskan sebagai 'parasuicide' maka bukanlah dalam kepentingan dan kebajikan kanak-kanak tersebut bahawa dia, pada tahap awal dan penting hidupnya ini, dibesarkan dalam alam sekeliling yang akan mendedahkannya kepada risiko yang di bawa oleh perlakuan suami yang tidak tentu hala (lihat ms 602C–F).

(8) Setelah mempertimbangkan kesemua factor-faktor dan dengan memberi keutamaan kepada kebaikan kanak-kanak tersebut, penjagaan dan kawalan kanak-kanak itu harus diberikan kepada isteri dengan akses yang munasabah diberikan kepada suami (lihat ms 603C–D).]

Notes

For cases on custodianship, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2575–2652.

Cases referred to

B (an infant), Re [1962] 1 All ER 872 (refd)
C(A) (An infant), Re [1970] 1 All ER 311 (refd)
Chong Siew Lee v Low Mun Chong [1995] 4 MLJ 559 (distd)
H v H & C [1969] 1 All ER 262 (distd)
Helen Ho Quee Neo v Lim Pui Heng [1974] 2 MLJ 51 (refd)
J v C [1970] AC 688 (folld)
K (Minors), Re [1977] Fam 179 (refd)
K Shanta Kumari v Vijayan [1986] 2 MLJ 216 (refd)
KO (an infant), Re [1990] 1 MLJ 494 (refd)
L (Infants), Re [1962] 3 All ER 1 (distd)
Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189 (refd)
McGarth (Infants), Re [1893] 1 Ch 143 (refd)
Orr, Re [1973] 2 DLR 77 (refd)
PP v Abang Abdul Rahman [1982] 1 MLJ 346 (refd)
Tan Siew Kee v Chua Ah Boey [1988] 3 MLJ 20 (refd)
Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234 (refd)
Thain, Re [1926] Ch 676 (refd)

W v H [1987] 2 MLJ 235 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212 (refd)

Legislation referred to

Guardianship of Infants Ordinance (Cap 93) ss 2, 3
Guardianship of Minors Act 1971 [Eng] s 1
Law Reform (Marriage and Divorce) Act 1976 s 88(3)

Dr Chew Peng Hui (Battenberg & Talma) for the plaintiff.
Joseph Tang (Tang & Co) for the defendant.

Clement Skinner J: This is an application by the plaintiff wife for the care, custody and control of a child, a boy, LZK, who is now with the defendant husband.

It will be more convenient hereafter to refer to the plaintiff and defendant as the wife and the husband respectively. I should mention that when this application was filed, the wife had also claimed from the husband a monthly sum of RM300 as maintenance towards the child but her claim for maintenance was withdrawn.

The husband and wife were married on 28 October 1997. He was then 24 years of age and she was 19 years old. They both shared a common interest — it was in music. After the marriage, they lived at various places but the last was at the husband's parent's house at 9A, Jalan Maludan Utara, Sibu, Sarawak.

The marriage was not a happy one. Within 14 months of getting married, that is, by 3 December 1998, the wife had returned to her mother's house.

After the marriage, the wife taught music at the Salim Music Centre which was run by the husband and wife. The husband taught music there as well. One of his students was a lady by the name of Kong Siew Ping. The wife alleges that in December 1998, when she discovered that the husband was having an affair with Kong Siew Ping, she returned to her mother's house. She was by then seven months' pregnant. The wife also says she returned to her mother's house because the husband was a man of ungovernable and uncontrollable temper and she feared for her safety and that of the unborn child. When she left for her mother's house, it was with the blessings of the husband's parents. The husband denies the allegation of adultery but there is no doubt that Kong Siew Ping featured prominently in their marital differences.

After the wife returned to her mother's house, she received a visit from the husband on Christmas Day of 1998. He did not come alone. His father was there too and so was the wife's mother. According to the wife, the husband came to ask for a divorce and for her permission for him to live with Kong Siew Ping. The wife would not agree and the husband's father was against the idea as well. When the husband discovered everyone was not agreeable to his request, he wanted to leave but was stopped by his father.

A At that point the husband became violent and uncontrollable. He rushed into the kitchen, grabbed hold of three choppers and threatened to kill his father. The police were called whereafter the husband was detained for one night. I shall refer to this incident as the 'chopper incident'.

According to the wife, the next night, 26 December 1998, the husband
B bought a ring and presented it to Kong Siew Ping on the following day. She accepted the ring but due to objections from her family members, returned it to the husband on 2 January 1999 which caused the husband to become hysterical, as a result of which he had to be admitted to the local hospital. A perusal of the discharge summary issued by the Sibu Hospital on the husband's discharge shows that the husband was admitted on 2 January
C 1999 and discharged on 4 January 1999 and was diagnosed as 'parasuicide'. I shall refer to this incident as 'the ring incident'.

The wife also alleges that at around that time, ie early January 1999, the husband deliberately set fire to a semi-detached house which had been rented by them for teaching music. I shall refer to this as 'the fire incident'.

D The husband does not deny that these incidents took place but has sought to explain why he behaved in the manner he did. With regard to the chopper incident, he said he was upset and depressed as his attempts at reconciliation were rebuffed by the wife, whom he felt was being influenced by her mother. According to the husband, he was on the verge of a mental breakdown and his father, being concerned for his safety and as a purely
E precautionary measure, called the police so that he would be detained for one night.

With regard to the ring incident, the husband said that on 26 December 1998, he was very depressed and mentally upset as a result of what he perceived as his wife's refusal, under the influence of her mother, to
F compromise and reconcile with him. He had bought a ring for the wife but she refused to accept it. Being angry and in the face of what he considered as unfounded allegations of his relationship with Kong Siew Ping, he gave the ring to her. The husband said that at that time, he was depressed, confused and angry.

With regard to the fire incident, the husband said that he did not
G deliberately set fire to the house but that while still very upset and depressed about his matrimonial problems, he was burning some old letters, magazines and waste paper in the kitchen of the house when the fire got out of control and damaged the kitchen. He had since paid the house owner compensation of RM2,000 for the damage caused.

H When the wife was ready to give birth, she checked into the Rejang Medical Centre, a private clinic, and requested for anonymity as she feared the husband would go there to disturb her if he knew her whereabouts. The child was born on 8 March 1999. The next day, the wife obtained a birth certificate for the child but it is not the usual birth certificate one is accustomed to seeing. The particulars stated in this birth certificate only
I gives the child's name, his sex and date and place of birth. The reverse side of the birth certificate contains particulars of the child's mother, ie the wife, her identity card number, her race and religion. The birth certificate

contains no information about the child's father. The wife says that she obtained such a birth certificate for the child as the husband had not taken care of her during her pregnancy and as he was having an affair with Kong Siew Ping, she considered him an irresponsible husband and father. She also considered that their marriage had irretrievably broken down. The husband, however, denies that he did not care about the childbirth. He alleges that both he and his father had made enquiries at all the private maternity clinics in Sibu and even Kuching to locate her but were unsuccessful.

Soon after the birth of the child, the husband and wife went to a legal firm in Sibu and there signed a joint petition, applying for a dissolution of their marriage. That was on 22 March 1999, but the joint petition was not to be presented until after 27 October 1999 when the parties would have completed two years of marriage. In their joint petition, the care, custody and control of the child would go to the wife with reasonable access to the husband. However, the husband later withdrew his consent to go through with the joint petition for a divorce by reason whereof, it has not been proceeded with.

The wife then, sometime towards the end of April 1999 went to Johore Bahru to look for a job and spent some ten days there. While there, the child was left in the care of her parents and a baby-sitter. On the wife's return to Sibu sometime in May 1999, the husband and wife met and reconciled their differences. On or about 30 May 1999, the wife and child returned to stay with the husband at his parents' house.

Their stay together was rather short because at the end of June, the wife left for Johore Bahru to complete her assignment there as a music teacher at a Child Development Centre. But her leaving for Johore Bahru on this occasion seems to have been a happy one as photographs taken of the event at the airport show smiling faces on her send-off by the husband, child and his parents. The child was left in the care of the husband.

By July 1999, the husband had joined the wife in Johore Bahru and at the end of July 1999, they decided to return to Sibu.

On their return, the husband, wife and child stayed with his parents at their house at 9A, Jalan Maludan Utara, Sibu, but it seems, marital harmony was to elude them. By the end of July 1999, the wife had secured a part-time job as a music teacher at the Wong Nai Siong Secondary School, Sibu, earning a salary of RM500 but the husband apparently objected to her working there and she alleges that on two occasions, in August and September 1999, he went to the school to 'disturb' her. By October 1999, they were quarrelling. The wife alleges that on 28 October, a quarrel took place during which she was pushed and assaulted by the husband. The wife then alleges that on the following night, while she and the baby were asleep, the husband, for no apparent reason, splashed water over her and the bed and threw the baby's milk powder into the dustbin. According to the wife, the incident frightened the child and caused him to cry incessantly. I shall refer to the above incident as 'the milk powder' incident.

A Within three or four days of the milk powder incident, the wife left the husband and returned to her mother's house but without the child. The events leading to her doing so were that after the milk powder incident, the wife went out for two nights with a friend to find peace of mind and to ponder whether she had made the right decision to return to the husband. On the wife returning home slightly after midnight on the second night, the B husband wanted to know where she had been that night and the previous night. He suggested they go for a ride in the car to discuss the matter. They ended up quarrelling. By 2.30am in the morning of 3 November 1999, the wife with the help of a friend returned to her mother's house. She alleges that she was prevented by the husband and his parents from taking the child C with her. The husband denies this.

The wife then tried to get back the child through the Welfare Department, Sibu, and the Welfare Officer did arrange a meeting with the husband on 5 December 1999 but he turned up for the meeting without the child.

D On New Year is Day of 2000, the husband went to see his wife at her mother's house. According to him, it was to reconcile with her and bring her home. The wife ignored him and instead went to attend a function at the Sibu Civic Centre with her mother. The husband followed them there and according to him, she kept on ignoring him. She said she was scared to meet him in case he caused a scene there. The upshot was that he did not get to E meet her there. At about 11pm he called the wife over his handphone and finding that she had returned to her mother's house, drove there in his car. He was met with closed gates. This apparently angered him. He then rammed the gate down with his car after which the wife had to call the husband's father to sort out the matter. According to the husband, he did not knock down the gate purposely. He was very upset at being ignored by F the wife.

On 1 February 2000, the wife commenced these proceedings. On 21 February 2000 when this application came up before the former resident judge, the husband was already represented by counsel. On 27 February 2000, the husband wrote a letter to the Kapitan Cina who had performed G the marriage ceremony between the husband and the wife, informing him about their marital problems and requesting for his help to solve their problems. The husband continues, in affidavits filed in these proceedings, to profess his love for the wife and the wish to reconcile with her, including waiting for the Kapitan Cina to arrange a date for a meeting between them to reconcile.

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The wife continues to work as a music and physical exercise teacher at the Wong Nai Siong Secondary School earning a salary of RM600. Her working hours are from 2–4pm Monday to Friday except Wednesday afternoon and on Saturday from 9–11am. She augments her income by giving private tuition from 6.30–8.30pm on Monday to Friday and earns I about RM300 for her efforts. The wife is confident that she will be able to spend sufficient time with the child if granted custody. She lives with her parents in a semi-detached house and will be assisted by them and a baby-

sitter in looking after the child, especially when she is at work. Her mother works in the civilian side of the Police Force. A

The husband, on the other hand, works as a sales executive with an electrical engineering company which has its head office at Selangor but its Sibu branch office at the semi-detached house of the husband's father. He earns a salary of RM2,200 and receives a car allowance of RM300. The husband occupies a room in that house which he shares with the child who apparently sleeps together with him at night. The husband's father is a hospital assistant and his mother a staff nurse at the Sibu General Hospital. They both work office hours and assist in looking after the child whom they love very much. There is also a brother of the husband staying at the house and he too, helps to look after the child. So does a full time baby-sitter. According to the husband, his working hours are from 8–12.30pm and from 2–5pm but as his office is in his house, he is able to spend time with the child even during his office hours. B C

The father of the husband has filed an affidavit in these proceedings in which he confirms that he and his wife help to look after their grandchild after their office hours and will continue to do so if custody of the child is left with the husband. He also says he and his wife love their grandson very much. D

When this application came on for hearing before me, I ordered, at the request of counsel for both parties that the deponents of the affidavits filed in these proceedings be available for cross-examination. In the event, counsel for the husband availed himself of the opportunity and cross-examined the wife on her affidavits. Counsel for the wife, however, did not avail himself of the opportunity. Neither the husband nor his father was cross-examined at all on their affidavits. E

As far as the law is concerned, s 2 of the Guardianship of Infants Ordinance (Cap 93) provides that in proceedings for the custody of an infant, 'the court shall regard the welfare of the infant as the first and paramount consideration' and neither the father nor the mother has a superior right of custody. F

In *J v C* [1970] AC 688, Lord MacDermott who delivered the opinion of the House of Lords, explained the words 'the court shall regard the welfare of the minor as the first and paramount consideration', which is found in s 1 of the English Guardianship of Act 1971 in the following terms at pp 710–711: G

> ... it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think that they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed. H I

A Lord MacDermott's explanation of those words found acceptance and was applied in our jurisdiction by Edgar Joseph Jr J (as he then was) in *Re KO (an infant)* [1990] 1 MLJ 494. The learned judge, after observing that English authorities explaining the effect of these words have been consistently relied upon by our courts (see, for example, the Federal Court decision in *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189), said he B had derived much assistance from that passage of the judgment of Lord MacDermott and drew attention to the fact that in *Re K (Minors)* [1977] Fam 179, Stamp LJ had advised that what Lord MacDermott had said 'should be in the mind of every judge who tries an infant case'.

And his Lordship Edgar Joseph Jr J also found the question, what is C meant by the expression 'welfare of the child' was answered for him by Lindley LJ in the case of *Re McGrath (Infants)* [1893] 1 Ch 143 at p 148 where it is stated thus:

> But the welfare of the child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its D physical well-being. Nor can the ties of affection be disregarded.

Apart from s 3 of the Guardianship of Infants Ordinance, the other statutory provision that will be relevant in deciding the issue at hand is s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 (hereafter 'the Act') which states that there shall be a rebuttable presumption that it is for E the good of a child below the age of seven years to be with his or her mother but that in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

The rationale behind this presumption has been explained in a number F of cases. It is that this period, ie until a child reaches seven years of age, is a period of nurture when a young child is dependent on the mother for its physical and emotional needs. Thus, in *K Shanta Kumari v Vijavan* [1986] 2 MLJ 216 at p 218, Wan Yahya J (as he then was) said:

> Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the Courts have always G leaned in favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependant on its own mother than anyone else.

And in *Re Orr* (1973) 2 DLR 77 Muloch CJ said:

> In the case of a father and mother living apart and each claiming the custody H of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child 'during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father ...'

And in *W v H* [1987] 2 MLJ 235 Shankar J (as he then was) in deciding that I custody of a newborn baby should be given to its mother said at p 242:

> I would state it as a categoric opinion of this court that in such a situation an overwhelming case would have to be shown before a newborn baby should be

> deprived of the society of its mother. It would be unwise to try and catalogue the circumstances before such an order would be made, but I would venture to suggest that the applicant in such cases would have to come close to proving that the health or welfare of the infant would be put at serious risk if it is left with the mother.

Thus, even though the presumption is a rebuttable one, Shankar J in *W v H* was of the option that strong grounds would be needed to rebut the presumption. Similar sentiments were expressed by Donovan LJ in *Re B (an infant)* [1962] 1 All ER 872 where the child was four years old. He said (at p 875):

> Prima facie a child of this age ought to remain with his mother and strong grounds are required to justify taking him away.

In the same case, Harman LJ said in the case of a child young enough to need the day to day care of his/her mother that it is better to leave the child with the mother unless the mother is an entirely unsuitable person.

It is with the above principles in mind that I turn to consider the circumstances and competing contentions in this case. The case for the wife has been argued on the premise that there is a presumption of law under s 88(3) of the Act that it is for the good of the child that she should have custody. Quite apart from the presumption, it was said that the wife was an unimpeachable parent with a character and temperament best suited to provide the child with a stable environment in which to be brought up in so that he could grow up and develop properly. This is to be contrasted with the husband whose ungovernable and uncontrollable temper made him unsuitable temperamentally for custody. It was submitted on behalf of the wife that the chopper incident, the ring incident, the fire incident, the milk powder incident and the gate incident show that the husband is not only a risk to himself but to those around him and it would not be in the best interest of the child that he should be exposed to the risk of the husband's uncontrollable and violent behaviour. Quite apart from the above, it was also argued on behalf of the wife that the husband, because of his alleged adultery with Kong Siew Ping, did not have the moral character suitable for bringing up the child.

On the other hand, the case for the husband was argued on the basis that the presumption under s 88(3) of the Act would only apply in favour of the wife 'when all other factors are equal' and that on the facts of this case, all the factors are not equal as (a) the wife was not a person who could spend sufficient time with the child, (b) that the present surroundings in which the child was being brought up, namely, a semi-detached house owned by the husband's parents best secured his welfare end interest, (c) that it was in the child's best interest that he should be brought up in the love and security of a home with both parents and to this end, the husband was willing to reconcile with the wife for the sake of the child but she was not willing to do so, (d) the existing arrangement where the child is with the husband should not be disturbed as to do so would upset and emotionally disturb the child.

It was also argued on behalf of the husband that quite apart from the presumption not applying in this case, the wife was not suitable for custody

A as she had not acted in the best interest of the child when she obtained a birth certificate for the child which did not show the father's name on it.

With that, I now address the contentions and begin by looking at the applicability of the presumption under s 88(3) of the Act.

B It was the submission of counsel for the husband that the presumption under s 88(3) would only apply in favour of the wife 'when all other factors are equal' and in support of his contention referred to cases (see *Chong Siew Lee v Lau Mun Chong* [1995] 4 MLJ 559 at p 561, *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234 at p 240, *Helen Ho Quee Neo v Lim Pui Heng* [1974] 2 MLJ 51 at p 53 para (left), *H v H and C* [1969] 1 All ER 262 at p 263).

C I regret I cannot agree with the submission of counsel for the husband on this point. While a court must keep at the forefront of its mind that s 2 of the Guardianship of Infants Ordinance requires that the welfare of the child shall be the paramount consideration in applications of this nature, I do not think the rebuttable presumption under s 88(3) is to be held in D abeyance when a court is considering all the relevant factors in deciding custody and only fall back on the presumption under s 88(3) when all other factors are equal as suggested by counsel for the husband. In my judgment, the clear and plain words of s 88(3) must be given effect to (but keeping in mind what is stated in the section itself) where, as in the present case, the E child concerned is under seven years of age and the presumption should be considered as one of the factors in awarding custody. I also agree with counsel for the wife that s 88(3) is an evidential provision and once it comes into play, it is for the judge to consider whether or not the presumption has been rebutted by what is revealed in the proceedings.

F I also find that a careful reading of cited by counsel for the husband do not support the proposition he makes. In *Chong Siew Lee v Lau Mung Chong* the learned judge there found that the presumption under s 88(3) had been sufficiently rebutted by evidence produced by the husband. But in arriving at his decision the learned judge never said anything about 'all other factors being equal' or indeed that he arrived at his decision on that basis. In *Helen* G *Ho Quee Neo v Lim Pul Heng* which was a Singapore case of 1974 vintage, the court was not considering any presumption at all. Instead, it was addressing the correct approach a court should take in granting custody of a boy aged six and it was in this context that the court approved of the approach taken by Harman LJ in *Re C(A) (an infant)* [1970] 1 All ER 311 where the learned judge said that there is no hard and fast rule that a boy H should be with his father and that a girl of under three should be with her mother but that other things being equal, that may be so. But it should be noted that Harman LJ in *Re C(A) (an infant)* as well as Salmon LJ. In *H v H and C* (which is the other case which counsel referred to in which the expression appears) were referring to the application of common law principles in custody cases but as pointed out by Edgar Joseph Jr J in *Re KO* I *(an infant)* 'there is no equivalent provision in United Kingdom legislation' to s 88(3) of our Act. In *Teh Eng Kim v Yew Peng Siong*, the Federal Court also did not consider the presumption under s 88(3). In fact, the Act was

not yet in force when the case was decided and it was in that context which the Federal Court referred to the position in other jurisdictions including the judgment of Muloch LJ in the Canadian case of *Re Orr* (1973) 2 D LR 77 where the learned judge said that the general rule is that the mother, other things being equal is entitled to the custody of a child under seven years of age.

Reverting to the facts of our case, the child is only two years seven months old now and therefore, the presumption under s 88(3) applies in favour of the wife. As it is a rebuttable presumption, I now consider whether it has been rebutted.

Although counsel for the husband has not specifically submitted that the presumption has been rebutted, he did submit that 'all things are not equal' in this case and therefore the presumption cannot apply. I shall, therefore, treat such a submission as a submission that the presumption has been rebutted. Counsel gave the following reasons for saying so.

It was first said on behalf of the father that he had shown, by the fact that the child was presently with him, that he could look after the welfare of the child and provide him with a conducive stable home because he had all the time to be with the child even during his office hours as his office was at his parents' house. It was also said that the husband is assisted by his parents and a maid in looking after the child who even sleeps with the husband at night. As opposed to this, it was said that the wife would have very little time for the child as she was a full-time employee in her school and had to work extra hours to earn extra income. It was also said that there was no indication from the wife's mother that she was willing to assist the wife in looking after the child, unlike the husband's father who had affirmed an affidavit to that effect.

With reference to the submission made on behalf of the husband that he was able to spend more time with the child than the wife could, I think counsel for the husband has overlooked the evidence about the working hours of the wife. She works only in the afternoons from 2–4pm which means that she would have all morning and until 2pm in the afternoon to devote to the care and needs of the child. This is to be contrasted with the position of the husband who may be physically present near the child during his working hours but that does not necessarily mean that he is able to devote care and attention to the child during that time and even less so if he is required or expected to attend to the business of his employers all that while. During the relatively short period while the wife is at work, the child will be looked after by a baby-sitter whenafter the wife's mother will assist with caring the child when she comes off work. I do not see the situation very much different with the husband because during his working hours, the child is looked after by a baby-sitter as well and then by his parents when they come off work. The wife may at present work extra hours in the evening to augment her income but as pointed out by counsel for the wife, she may not need to continue to do so if she is granted custody as she may apply for maintenance towards the child from the husband. With regard to the role played by the husband's parents in assisting to look after the child and their

A love for him, I have no doubt that they are happy to do so and love the child very much but I think the same may be said of the wife's mother. Although she has not filed an affidavit in these proceedings, the fact remains that she has in the past assisted in looking after the child. I therefore see very little in this point on the role of the respective grandparents.

B The same may be said about the point made by counsel for the husband that he presently stays with the child in a semi-detached house owned by the husband's father which has all the features and comforts of a modern day house, with three bedrooms, a kitchen, sitting room and dining area. So too with the wife. She lives with her mother who occupies a semi-detached house also and while there are no photographs of it, I do not think that C would lead me to conclude that it will be any less suitable for the child, especially when he was already staying in that house before being taken to the house of the husband's father.

Having said that, I should also point out that in matters of custody, the authorities show that the word 'welfare' must be taken in its widest sense so D that the welfare of the child is not to be measured by which parent earns the most money and can provide the child with best physical comforts alone. A child's moral needs must be taken into account as well (see *Re McGarth (Infants)* [1893] 1 Ch 143 at p 148 and *Re Ko (an infant)* [1990] 1 MLJ 494 at p 497).

E Counsel for the husband has cited several cases to me in which the care, custody and control of a child has been given to a father instead of a mother but a reading of each of them shows that the facts of those cases are entirely distinguishable from that of ours in that the conduct of the mother in those cases made it unsuitable for custody to be granted to them. In *H v H & C* [1969] 1 All ER 262, the mother abandoned the child who was some 3 years F old, to live with another man but came back to claim custody after some 20 months; in *Chong Siew Lee v Lau Mun Chong* [1995] 4 MLJ 559, the wife had left the home voluntarily. She had been coming home late at night while still staying at the matrimonial home and was associating with another man. She was also dabbling in the share market and had incurred debts and there was real uncertainty about where she would bring up the child if granted G custody. In *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20, the wife was a mahjong player who kept company with single and divorced women. She borrowed heavily from loan sharks and neither had the ability nor the desire to look after the child. As I said, none of these complaints manifest themselves in our case. In fact there is a complete lack of evidence to show that the wife is an uncaring, unloving or negligent mother.

H It was next said on behalf of the husband that at this point in time there are no divorce proceedings pending between the parties and that the husband is anxious to reconcile with the wife but that she has rejected his moves. It was the submission of counsel for the husband that reconciliation would only benefit the child who needs to be brought up in the love and I security of a home with both parents. In support of what he said, counsel referred to the following passage in the judgment of Lord Denning MR in *Re L (Infants)* [1962] 3 All ER 1 where at p 3 this is what the Master of the

Rolls said about a mother in that case who did not wish to reconcile with her husband:

> Now what is to be done? I realise that as a general rule it is better for little girls to be brought up by their mother, but, nevertheless, if these children are to be given to the mother now, I can see no chance of reconciliation, whereas if they remain with their father, there may be some hope, even if it is only a faint hope, that she will return for the sake of the children themselves; and if only that would happen, their welfare would be ensured in the best way of all.

Referring to the above passage, counsel for the husband took two points. He first said that as the wife had not made any attempt to reconcile with the husband, she is not suitable to be given custody because she did not have the best interest of the child at heart, which if she did, she would reconcile with the husband. Counsel also said that if the child were to remain with the husband, then there was a chance that the wife would reconcile with the husband for the sake of the child. Therefore, custody should be given to the husband.

I must immediately point out that the facts in the case of *Re L (Infants)* and in our case are poles apart. In that case, the mother of two young children had left the husband for another man. The husband there was a person who had done no wrong and against whose conduct not a word could be said. The wife claimed custody of the children. The husband was willing to forgive the wife and to take her back so that they could both bring up the children but the wife was unwilling to reconcile. It was against that factual background that Lord Denning made his remarks. It is not difficult to see that that factual situation does not prevail in our case. The wife here has not left the husband for another man, and, as will be seen shortly, there are several things that can be said about the conduct of the husband.

I also find that the attack levelled against the wife's refusal to reconcile has overlooked one crucial fact; it is this: the wife had already tried to reconcile with the husband once. It will be recalled that the wife had left the husband in December 1998 because of his alleged adultery with Kong Siew Ping. But in spite of what she believed and even after having endured in her state of pregnancy the chopper incident, the ring incident and the fire incident, after the child was born the wife had returned to the husband and reconciled with him. But as the facts show, the reconciliation was unsuccessful. In her cross-examination, she was asked about this reconciliation in May of 1999:

Put:	When you and your husband reconciled towards end of May 1999, you and your husband have been living together with your son as a normal happy family.
A:	Yes.
Put:	You had forgotten about the matters with Kong Siew Ping and you would start life with your husband afresh.

A: To forget the past is impossible for me, but anyway I tried to start living with my husband again and for the sake of the child as well.

With the wife having already given reconciliation a chance for the sake of the child, I do not think she can be faulted for not wanting to do so again. There are also several reasons to doubt the sincerity of the husband's manifestations of a wish to reconcile with the wife: (a) there is no evidence to show that the letter written to the Kapitan Cina by the husband on 27 February 2000 was ever 'passed' to the Kapitan Cina as alleged; (b) both that letter as well as the letter dated 4 April 2000 from the husband's advocates requesting reconciliation were written after the husband became aware of these proceedings and the wife's claim for custody of the child. The requests for reconciliation, in the circumstances, certainly seem to be directed at enhancing the husband's case in this contest for custody while at the same time making it appear that the wife does not have the best interest of the child at heart by rejecting the husband's attempts to reconcile; (c) an attempt at reconciliation had been made by the husband shortly before the filing of this application. That was on New Year's Day of 2000 when the husband said he went to see the wife at her mother's house to reconcile and to bring her home but ended up with him ramming the gates of the house down with his car. The husband's conduct, far from being conciliatory, was instead a frightening display of anger.

I accordingly find the arguments advanced on behalf of the husband on the ground of reconciliation quite perverse in the circumstances.

It was next said on behalf of the husband that to disturb the present arrangement and to take the child away from its present surroundings would upset and emotionally disturb the child. I do not regard this case as one where the child is being suddenly uprooted and being thrust into an environment and surroundings and the company of persons which it is alien to. If custody is granted to the wife, the child is, as I see it, returning to a household, and surroundings from which it came and was familiar with and accustomed to, including the persons thereat. With reference to the fears expressed by counsel for the husband that the child will be emotionally disturbed by a change of households, I must say there is no medical evidence to suggest that this will be so (see *Re KO (an infant)* at p 498) and I would also refer to what was said by Eve J in the case of *Re Thain* [1926] Ch 676 at p 684 when speaking about the change in custody of a girl of nearly seven who had been brought up by an aunt and uncle since birth:

> It is said that the little girl will be greatly distressed and upset at the parting from Mr and Mrs Jones. I can quite understand it may be so, but, at her tender age, one knows from experience how mercifully transcient are the effects of parting and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case.

The child is only two years seven months old now and it would, therefore, in the absence of evidence to the contrary, be wrong to speculate that the child would be adversely affected by a change in custody.

Having considered all the factors raised by counsel for the husband, I find that the presumption under s 88(3) of the Act which applies in favour of the wife, has not been rebutted. A

Apart from the presumption which applies in her favour, I also find the conduct of the wife in relation to the welfare of the child quite unimpeachable. It was suggested to her in cross-examination that on the two nights prior to her leaving for her mother's house in the early morning of 3 November 1999, without the child, she was out late at night as she was seeing a man. She denied this allegation and explained that following the milk powder incident, she went out with a female friend to seek peace of mind and to ponder whether she had made the right decision in reconciling. I find the allegation about the wife seeing another man an unsubstantiated and baseless one. B C

The only word that may really be said against the wife in these proceedings is her conduct in having obtained a birth certificate for the child in which the father's name is not disclosed. It was plainly wrong on her part to do so. But should such conduct ipso facto disqualify her from having custody of the child? In *Re KO (an infant)*, Edgar Joseph Jr J drew attention to the change in attitude of the courts towards misconduct by a wife, and to the extent to which the courts will sometimes go to hold that misconduct on the part of a mother, by itself, may not disqualify her from having care and control of her children. To illustrate the point, the learned judge gave as an example, the attitude of the courts in cases of adultery committed by a wife where for many years the view held was that in children's cases a mother who had committed adultery should be deprived of the care and control of her children. As an example of a change in the court's attitude, the learned judge referred to *Re K (minors)* [1977] Fam 179 which concerned a boy aged five and a girl aged two. The father was an Anglican clergyman and the mother a teacher of religion. The mother formed an adulterous association with a member of the church youth group. The parties separated. The mother was granted care and control of the children as being 'the natural guardian protector and comforter of very young children, and in particular of a very young girl'. On appeal, the father argued that very considerable harm would be done to the children if they were brought up in a house where the mother and another man were living together in blatant defiance of church doctrine and all that the father believed in and where those persons showed no repentance. It was held, dismissing the appeal, that this did not justify care and control being given to the father, because even if the father succeeded, access including staying access, would be given to the mother and the children would eventually learn of the relationship. The mother succeeded because the court was not prepared to take away a little girl of two from 'a really good mother' and no one suggested the two children should be separated. Without putting too fine a point on it, it bears repeating that Edgar Joseph Jr J had cited *Re K (Minors)* not because it bore any resemblance to the facts of the case before him; indeed, they were poles apart but to put across his point that the misconduct on the part of a mother, by itself, may not disqualify her from care and control of her children. D E F G H I

Accordingly, I would hold that in the present case, although it was not in the child's best interest that the wife had obtained for it a birth certificate in the form it now holds, such conduct would not by itself be sufficient to disqualify her from having custody, care and control of the child. I do not think her having done so makes her any less of a caring and loving mother, capable of providing the child with all its physical, spiritual and emotional needs at this period of nurture.

I next consider the question of the suitability of the husband for custody of the child. Before I do so, this will be a convenient place to deal with a submission made by counsel for the husband about the failure of counsel for the wife to cross-examine him and his father on their affidavits. It was the contention of counsel for the husband that such failure, where the wife had been cross-examined on those parts of her evidence and the husband had not been cross-examined on those same issues, the court should accept the unchallenged part of the husband's evidence. In support, the case of *Public Prosecutor v Abang Abdul Rahman* [1982] 1 MLJ 346 was cited.

In my view, a correct statement of the law on this point is stated by the Federal Court in the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212. In that case, one of the grounds raised in the appeal against the conviction of the appellant was that the trial judge erred in law when he held that the failure of the defence to cross-examine two prosecution witnesses on the ammunition actually found in the trouser pocket of the appellant at the time of his arrest (the subject matter of the third charge against the appellant) constituted a clear admission of the charge of possession by the appellant. The Federal Court held that the learned judge had misdirected himself on the law in so finding but that such misdirection did not affect the correctness of verdict. This is what the Raja Azlan Shah CJ (as His Highness then was) who delivered the decision of the Federal Court said at p 213:

> We consider that statement of the law as a misdirection. A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition on the appellant's trouser pockets remain unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v Garry* (1973) 1 NZLR 120, where Haslam J said at p 122:
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> > 'In *Phipson on Evidence* 11th edition para 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, viz where "... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ... or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all".'

Keeping in mind what is stated above, I turn to consider the allegations made by the wife about the unsuitability of the husband to be awarded

custody of the child by reason of his unsuitable temperament and adulterous association with Kong Siew Ping.

As evidence of the husband's unsuitable temperament, the wife relies on the behaviour of the husband during the chopper incident, the ring incident, the fire incident and the gate incident. Even though the husband was not cross-examined on these incidents, I do not think that fact was of any telling significance because the husband does not actually deny or dispute that the incidents occurred. What he does do is to offer an explanation of why he behaved in the manner he did. But his explanations do not in any way diminish what is revealed by those four incidents, namely, that the husband is a person of volatile and uncontrollable temper with a propensity to resort to impulsive violent and dangerous behaviour. Especially worrying is his readiness to resort to the use of force to achieve his ends, which the chopper and gate incidents are examples of. Equally worrying is the fact that he is a risk to himself as well as to others, which the fire incident and his being diagnosed as a 'parasuicide' are examples of. Of particular concern is the fact that the husband was prepared to turn on somebody as close as his own father with a chopper.

The *Oxford University Press Concise Medical Dictionary* (15th Ed) contains this definition of 'parasuicide':

> A self-injuring act (such as an overdose of sleeping tablets) that is not motivated by a genuine wish to die. It differs from attempted suicide in being common in young people who are distressed but not seriously mentally ill. However, many people who have acted in this way go on to attempt, or even to achieve, suicide. Help in sorting out their difficulties should therefore be given.

In the circumstances, I find that it would not be in the best interest and welfare of the child that it should, at this early and critical stage of its life, be brought up in an environment that exposes it to the risks posed by the husband's volatile temperament. I do not think the child's physical and emotional well-being are best secured by being left with the husband. It would in my judgment be imprudent to do so in the circumstances of this case.

It was submitted on behalf of the husband that it was not appropriate that the wife should now raise questions about the suitability of the husband to be granted custody when the wife had twice seen it fit to leave the child in his care. The short answer to that submission is that on the first occasion when the child was left with the husband (when the wife left for Johore Bahru to complete her assignment) his suitability was not in issue. The wife had reconciled with the husband for the child's sake and in those circumstances, it was quite natural that she should leave the child with him when she went away. On the second occasion, the wife did not leave the husband's parent's house in happy circumstances. In fact, she said she did not even take her identity card when she left the house. In the circumstances, I do not think it can be said that the wife voluntarily left without the child in the early morning of 3 November 1999, and the fact that by 8 December 1999 she had made attempts through the Welfare Officer to get possession of the child is consistent with that fact.

With regard to the allegation of the husband's adulterous association with Kong Siew Ping, the wife's allegations were of a general and imprecise nature. The husband was not cross-examined on this issue and neither was his denial of it in his affidavit. His credibility on this issue remains unshaken and his denial of adultery must be given the weight it deserves. Counsel for the wife has submitted that the husband was not examined on the allegation of adultery so as not to aggravate an already sensitive situation. I am afraid that there was no intimation from counsel during the proceedings that that was the reason for abstaining from doing so. I must, therefore, reject the submission. Accordingly, I find that the allegation of adultery against the husband not made out.

There is a final matter I wish to mention. I had an opportunity to observe the child during proceedings. He was healthy and appeared happy. I did not attempt to interview the child as he is only a toddler and nothing would have been achieved by my doing so.

In the result, having considered all the factors outlined above and for the reasons given, I find that giving paramount consideration to the welfare of the child vis-a-vis his physical as well as his moral, spiritual and emotional well-being, the custody, care and control of the child should be awarded forthwith to the wife subject to reasonable access to the husband in the following terms. The husband is to be granted access to the child on each Saturday and Sunday between 12pm and 5pm and staying access on each alternate Saturday from 5pm to 5pm on Sunday. I also award costs to the wife.

Plaintiff's application allowed.

Reported by Lim Lee Na